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No. 88-5080

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In The

Supreme Court of the United States

October Term, 1988

DANIEL HOLLAND,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the right to an impartial jury guaranteed by the Sixth Amendment requires that jurors be selected for the petit jury on the basis of their group membership.

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Daniel Holland, who is white, was charged by indictment with rape, deviate sexual assault, aggravated kidnapping, and armed robbery as a result of a May 4, 1980 attack on a 17-year-old white woman. Petitioner was tried in July 1981 in DesPlaines, Illinois, before an all-white jury after a *voir dire* during which the State used two of its ten peremptory challenges against black prospective jurors and eight against whites. Petitioner was found guilty of all charges except aggravated battery. He was thereafter sentenced to imprisonment for a term of 60 years each for rape and deviate sexual assault, 30 years for aggravated kidnapping, and 25 years for armed robbery, all sentences to run concurrently except for the armed robbery sentence which was to be served consecutive to the other terms.

The victim and her boyfriend, both teenagers, were driving home from a party in Schiller Park, a suburb northwest of Chicago, around midnight when they had a flat tire. (R. 807) After discovering that the spare tire was also flat, the couple waited for assistance for over an hour, but no one came. (R. 808) They decided to sleep in the car and slept until dawn, when they began walking to find help. (R. 809-810)

Petitioner stopped his blue Camaro and offered the couple a ride. (R. 811) They accepted, the victim's boyfriend getting in the back seat, the victim sitting in the front passenger seat. (R. 811) Shortly thereafter, petitioner stopped the car, wrapped his arm around the victim, put a knife to her throat and ordered the victim's boyfriend out of the car. Initially, the young man refused, but complied after petitioner threatened to kill the victim. (R.

813-814) Petitioner dragged the victim from her seat and forced her to sit in between the front bucket seats next to him, holding the knife under her arm. (R. 815) Petitioner headed for the tollway as the terrified victim begged him to let her go. (R. 815) Petitioner said he would let her go only when he was through with her. (R. 815)

Petitioner pulled into the parking lot of an apartment complex in DesPlaines, another northwest suburb, and told the victim that if she did not take her clothes off, he would cut her up. (R. 816-818) The victim began to remove her clothes, but petitioner tore off her overalls and underpants and cut her bra with a knife. (R. 819-820) Petitioner forced the victim to perform fellatio upon him. (R. 821) Dissatisfied with the victim's performance, petitioner cut her right thigh with his knife. Petitioner then left the parking lot and began driving around with his penis still in the victim's mouth. (R. 822-823) After about a half hour, petitioner stopped his car again, this time in an alley. (R. 823) At this point, petitioner forced the victim to sit on top of him and have intercourse with him, threatening to kill her if she did not do as he said. (R. 824-826) After penetrating her vagina several times, petitioner then told the victim to get out of the car, and knife in hand, forced her to kneel and perform fellatio upon him as he stood. He then ordered her to get up against the car with her back facing him and once again penetrated her vagina with his penis, this time from behind. (R. 826-828) Petitioner then allowed the victim to get dressed and took about sixty dollars in cash and her school identification card from her before leaving the scene. (R. 805-829)

Petitioner was arrested around 8:00 a.m. that morning, driving the blue Camaro. (R. 24, 28, 33-35, 103-105) The victim's school identification card and a blood-stained knife were recovered from him, as was fifty-eight dollars in

cash. (R. 55-61, 71, 74) That same day, after receiving medical treatment, the victim positively identified petitioner from a photo array and in a line-up. (R. 842-843) Later the same day, petitioner confessed to the rape and armed robbery. (R. 331)

Petitioner elected to be tried by a jury. Petit jury selection procedures in Illinois are governed by statute and by Supreme Court Rules. The statute directs the Jury Commissioners to prepare a list of all voters in the county. Ill. Rev. Stat. 1981, ch. 78, sec. 25. The voter list may be supplemented from the roster of Illinois driver's license holders, but this option is not used in Cook County. In 1981, numerous groups (elected State officials and members of the State Board of Education, judges, clerks of the court, sheriffs, coroners, physicians, Christian Science readers and practitioners, attorneys, ministers, members of religious communities, mayor, aldermen, police and firemen, and those employed on the editorial or mechanical staffs of major newspapers), were exempt from jury service. Ill. Rev. Stat. 1981, ch. 78, sec. 4. The exemption section was repealed entirely in 1987.

In all criminal cases, a jury of twelve must be selected. Ill. Rev. Stat. 1981, ch. 38, sec. 115-4(b). In 1981, the statute provided that the jury must be passed upon and accepted in panels of four. Ill. Rev. Stat. 1981, ch. 78, secs. 21, 23. In 1982, the Illinois Supreme Court promulgated Supreme Court Rule 434(a), which provides that the parties shall pass upon and accept the jury in panels of four commencing with the State, unless the court in its discretion directs otherwise. This has been interpreted as permitting of the trial judge to pick a jury by means other than panels of four. In a case such as this, where imprisonment is a possible penalty, each side is allowed ten peremptory challenges. Ill. Rev. Stat. 1981, ch. 38, sec.

115-4(e). In 1977, the Illinois Supreme Court held that there was no right to attorney *voir dire*; the statute conferring such a right, Ill. Rev. Stat. 1977, ch. 38, sec. 115-4(f), being in conflict with Supreme Court Rule 234. *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977). After *Jackson*, attorney *voir dire* was allowed only at the court's discretion.

At petitioner's trial, 40 jurors were examined before a jury of 12, selected in panels of four, was chosen. All initial questioning was conducted by the court. (J.A. 13-14) Fifteen jurors were excused by the court for cause, either health reasons or inability to be fair in a rape case. (R. 528, 551, 601, 618, 629, 633, 637, 655, 661, 668, 680, 697, 700, 740, 743) The defense excused three (R. 521, 750, 760); two of them were questioned by the defense attorney as well as by the court. The State used all ten of its peremptories (R. 528, 531, 565, 615, 615, 632, 677, 683, 706, 718); none of these individuals was questioned except by the court. Two of those excused (Juror Conley, R. 531, and Juror Mosley, R. 565) were black. These were apparently the only two black individuals on the venire.

During *voir dire*, defense counsel raised two distinct issues. First, he argued that his client was entitled to be tried by a representative cross-section of the community, but that out of 40 veniremen, only two were black. As counsel put it, "no blacks are available to a defendant." (J.A. 7-8) He made a request, which was denied, that the trial judge obtain a representative cross-section for the next day's venire. (J.A. 12) Counsel offered no statistics about the racial composition of the pool of registered voters in northern Cook County (including the suburbs north of Chicago), from which DesPlaines venires are drawn, and made no claim that there was anything

improper about the way Cook County jury pools were recruited. He simply requested that the court make an affirmative effort to bring in a venire representative of some unspecified "community." This venire issue was not pressed before either the Illinois Appellate Court (J.A. 19-20), or the Illinois Supreme Court (J.A. 70), and is not at issue now.

Second, trial counsel argued that the State had "systematically excluded", by means of peremptory challenge, the only two blacks on the venire. (J.A. 8) The claim was based on the Sixth Amendment (J.A. 9), and counsel argued that there was no apparent bias on the part of either Ms. Conley or Mr. Mosley to account for their excusal. (J.A. 10-11) When asked by the court to respond, the prosecutor said, "this elimination or this exemption from jury duty by the use of our peremptory challenge, was not based upon their race. That was not the intent of the State in doing so." (J.A. 9) The court pointed out that Mr. Mosley had a friend who had recently been murdered, and that any claim about the individual characteristics of excluded jurors would seem to be irrelevant to a claim of "systematic exclusion." (J.A. 11) The court ultimately denied petitioner's motion based on "the State's response, my observations of the witnesses, the *voir dire* that I conducted," and all the legal arguments. (J.A. 14-15)

On appeal, the Illinois Supreme Court held that petitioner, being white, had no standing under *Batson v. Kentucky* to maintain an equal protection claim (J.A. 70), and rejected the invitation to find that the excusal of black jurors violated petitioner's Sixth Amendment right to a trial by a jury representing a fair cross-section of the community (J.A. 70-71). That is the question now before this Court.

SUMMARY OF ARGUMENT

Petitioner, who is white and was charged with the rape of a white woman, was tried by an all-white jury after eight white and two black prospective jurors were excused by the State. Petitioner now argues that his Sixth Amendment right to a trial by an impartial jury was violated by the excusal of the two black jurors.

Race discrimination is, as petitioner correctly points out, a serious problem that has occupied this society for the past 100 years. However, it is a problem that is the subject matter of the equal protection clause of the Fourteenth Amendment, not the Sixth Amendment, and petitioner explicitly concedes that he lacks standing to bring an equal protection claim, being of a different race than the excluded jurors.

If petitioner, or some future litigant, believes that the standing requirement of the equal protection clause—reconfirmed only three years ago in *Batson v. Kentucky*, 476 U.S. 79 (1986)—is an impediment to full enforcement of the equal protection clause in the context of jury selection, he should challenge the standing requirement directly. He has chosen not to do so. Having made that choice, he may not now recast what is essentially an equal protection claim in the language of the Sixth Amendment (which has no same-race standing requirement) in order to achieve the same result by the back door.

Petitioner's suggested rule—the *Batson* remedy minus standing—is neither a Sixth Amendment nor an equal protection rule. It is a hybrid, with the absence of a standing requirement being the only recognizably Sixth Amendment antecedent. This approach confuses two distinct lines of constitutional jurisprudence, yet petitioner at no point

identifies a discrimination problem that is not adequately handled by *Batson*, nor does he identify a problem cutting to the heart of jury impartiality which is so serious that its remedy justifies the theoretical and practical costs associated with jury selection conducted under a hybrid rule.

In order to adapt the Sixth Amendment—which guarantees only an impartial jury—as a tool to handle supposed discrimination on the petit jury, petitioner takes as his starting point the Sixth Amendment jury pool selection cases, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. 357 (1979), which hold that the petit jury must be *drawn from* a pool representing a fair cross-section of the community. Petitioner then argues that the petit jury must be "fairly drawn" from the venire, that is, without exclusion on the basis of race, thus extending the fair cross-section requirement from the jury pool to the petit jury. Petitioner suggests that the new Sixth Amendment rule be applicable only when the excluded jurors are members of groups now cognizable under the equal protection clause, and that a *prima facie* case of discrimination be established as under *Batson*, and rebutted only by a showing of a race-neutral reason for exclusion. Thus, petitioner has recreated the *Batson* rule, but without a standing requirement.

Petitioner argues that several State and federal decisions—in particular, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979), and *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978)—are precedent for extending the fair cross-section requirement from the jury pool to the petit jury. However, each of those cases was decided before *Batson*, and involved a black defendant, a white victim, and an all-white jury; each court crafted a hybrid Sixth Amend-

ment-equal protection rule in order to solve a problem of race discrimination while constrained by the evidentiary burden of *Swain v. Alabama*—which has since been overruled by *Batson*. The rationale of these cases has thus evaporated. Because the instant case involves a white defendant and victim, it presents this Court with the opportunity to decide the pure Sixth Amendment case, unalloyed with overtones of race discrimination.

Respondent submits that petitioner cannot so easily pick and choose his constitutional analysis. If he is basing his claim on the Sixth Amendment, then he must in a consistent fashion apply the internal logic of Sixth Amendment jurisprudence (as set forth in *Taylor v. Louisiana* and *Duren v. Missouri*), unmodified by equal protection concepts. In accordance with these decisions, the claim would apply to the peremptory challenge of members of all distinctive groups in the community (not just racial minorities), and every defendant in every case would have standing to litigate the factual questions of group distinctiveness and systematic exclusion. A *prima facie* case would be rebutted by a showing that the underrepresentation was not "systematic." Discriminatory intent would play no role in a Sixth Amendment analysis.

Such extension of the Sixth Amendment cross-section requirement from the jury pool to the petit jury is unsound, unworkable, and unnecessary. Although petitioner assumes that the reason the jury pool must reflect the community is to provide a "fair possibility" that the petit jury will likewise reflect the community, petitioner ignores the fact that the jury system requires both a petit jury of individuals who are impartial as between the State and the particular defendant, and a broadly-based system of juror recruitment that will confer legitimacy on the criminal justice system and on the institution of trial by

jury. These differing functions and values require different selection processes for the different stages in the system.

Although petitioner disavows any claim that the Sixth Amendment requires the petit jury to contain a representative cross-section of the community, and instead seeks only the "fair possibility" that such will occur, compliance with a Sixth Amendment-based rule regulating peremptory challenges must necessarily be tested by the numbers. Under *Duren v. Missouri*, numerical underrepresentation of some distinct group in comparison with the population must be established. Because each case involves a single petit jury, statistics on jury composition over time are inapplicable, and compliance with, or a violation of, a fair cross-section requirement could be established only by comparing the proportion on the petit jury with the population. Without such a comparison standard, the observation of any particular distribution of groups on a single jury (like the observation of a single coin toss) provides no information about the fairness of the underlying system. Any attempt to substitute "discriminatory intent" for "systematic exclusion" simply collapses the Sixth Amendment analysis into the equal protection clause. Because the proportions cannot be compared until the jury is chosen, a violation would necessarily result in a mistrial (whether or not the jury was actually impartial) and jury selection would start over.

Adoption of such a quota-based standard would require this Court to overrule prior cases which have held unequivocally that "defendant is not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Lockhart v. McCree*, 476 U.S.162, 173 (1986); *Teague v. Lane*, 109 S.Ct. 1060, 1079 n.1 (1989) (Stevens, J., concurring in part). Further, there is an inescapable tension between the peremptory challenge (which

has historically been thought to advance impartiality) and a requirement that petit jurors be members of any particular group. Any claim that a juror be not only impartial but a member of any particular group ("impartial plus") is certainly not addressed by the Sixth Amendment.

In the absence of any evidence that current jury selection procedures lack popular legitimacy, are marred by race discrimination not adequately remedied by the *Batson* decision, or result in petit juries that are not impartial, petitioner's argument that the petit jury must reflect a fair cross-section of the community must be rejected. It is not necessitated by Sixth Amendment jurisprudence, and would result in juries that are selected after vastly more lengthy and costly *voir dires*.

ARGUMENT

I.

A JURY SYSTEM THAT SELECTS IMPARTIAL JURORS FROM A JURY POOL THAT DOES NOT SYSTEMATICALLY EXCLUDE ANY SEGMENT OF THE POPULATION PROVIDES THE IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO EACH INDIVIDUAL ACCUSED, AND PROVIDES LEGITIMACY FOR THE JURY SYSTEM IN THE EYES OF THE COMMUNITY.

A. A Sixth Amendment Approach To Alleged Discrimination Is Unnecessary Given That *Batson v. Kentucky* Is Now The Law.

Petitioner's suggested remedy—the elimination of the standing requirement of the *Batson* decision—is a hybrid derived largely from the equal protection clause, with just

enough admixture from the Sixth Amendment (the supposed source of the remedy) to obviate standing. This hybridization would create a precedent that is unlikely to serve future equal protection or Sixth Amendment jurisprudence well—all to no apparent purpose.

Petitioner starts not with the imperatives of the Sixth Amendment, but from the perspective of a need to eliminate race discrimination—the problem addressed by the equal protection clause. This Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), however, created a remedy that is entirely adequate to deal with discrimination. Of course, it is not available to petitioner, but one may be rightly suspicious of a claim of "race discrimination" when the case involves a white defendant, a white victim and witness, and the exclusion of eight white and two black jurors. Rather, the State "denies a black defendant equal protection of the law when it puts him on trial before a jury from which members of his race have been purposefully excluded." *Batson v. Kentucky*, 476 U.S. at 85, citing *Strauder v. West Virginia*, 100 U.S. 303 (1880). Any class of citizens excluded from jury service could of course file suit to enforce their own rights. *Carter v. Jury Commissioners*, 396 U.S. 320 (1970). The vindication of their rights thus does not turn on the availability of petitioner's services as private attorney general.

Although petitioner argues that there is precedent for grounding group-based jury selection rules in the Sixth Amendment (Brief for Petitioner at 12), he in fact points to no case that is not actually a "discrimination" case in Sixth Amendment guise. Petitioner relies primarily on two state court cases, *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979), and two federal Court of Appeals decisions, *McCray v. Abrams*,

750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), and *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded*, 478 U.S. 1001 (1986), *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987). In all four cases, black defendants were accused of crimes against white victims, and were tried by all-white juries (except Soares' jury which had one black juror). In each case the court turned to a Sixth Amendment or a state constitutional ground after finding that a federal equal protection claim—the obvious tool of analysis—was foreclosed by the evidentiary burden of *Swain v. Alabama*, 380 U.S. 202 (1965).

It seems safe to say that none of these opinions would have been written had the *Swain* evidentiary burden been overruled earlier, although the outcomes would certainly have been the same. None of these decisions adopts a full and internally consistent Sixth Amendment approach, and to a greater or lesser extent, each relies on equal protection concepts of suspect classifications, the *prima facie* case, and the theory of rebuttal by means of race-neutral explanations. The State decisions have no same-race standing requirement, but that is attributable to the state constitutions, not the Sixth Amendment, and the federal cases do not address the matter.[1]

[1] Petitioner asserts, Brief for Petitioner at 12 n.2, that seven States in addition to the above-cited jurisdictions have recognized a constitutional right to a petit jury selected to achieve a fair possibility it represents a cross-section of the community. In fact, of the additional seven cases, all the pre-*Batson* decisions are attempts to circumvent *Swain*; each is based at least in part on a State Constitution, each limits cognizable groups to equal protection categories, and each is some mixture of equal protection and Sixth Amendment principles. None follows a pure, internally consistent, Sixth Amendment approach. *See State v. Crespin*, 94 N.M.

(Footnote continued on following page)

Given that *Batson* has now overruled *Swain*, none of these contortions is necessary for a classic discrimination claim. In *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4709 (1989), which involved a claim readily cognizable under Title VII but brought under 42 U.S.C. § 1981, this Court stated that the fact that discrimination is forbidden by a clearly applicable law "should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct." The availability of one remedy should deter the Court from a "tortuous construction" of another statute in order to provide an alternative remedy. Although *Patterson* involves questions of statutory construction, the reasoning is no less applicable to the interpretation of two provisions of the Constitution. It may be assumed that *Batson* will be applied to any discrimination claim in which black jurors are excused during the trial of a black defendant, and petitioner does not explain why the peremptory challenge of a prospective juror who is of a different race than the defendant, especially when that defendant is white, should be conceptualized as "discrimination" against the defendant.

[1] *continued*

486, 612 P.2d 716 (N.M. Ct. App. 1980); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Riley v. State*, 496 A.2d 997 (Del. 1985); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (N.J. 1986); *Fields v. People*, 732 P.2d 1145 (Colo. 1987); *State v. Superior Court*, 157 Ariz. 541, 760 P.2d 541 (Ariz. 1988); *Seubert v. State*, 749 S.E.2d 585 (Tex. Ct. App. 1988). In the instant case, petitioner mentioned during *voir dire* that Article 1 Section 8 of the Illinois Constitution was similar to the Sixth Amendment (J.A. 10), but the point was not pressed and was not the basis of the trial court's denial of petitioner's motion. Both the Illinois Appellate and Supreme Courts addressed only federal constitutional grounds.

B. The Cross-Section Requirement For The Selection Of The Jury Pool And The Impartiality Requirement For The Selection Of Petit Jurors Complement Each Other, Jointly Producing A Jury System That Has Legitimacy In The Community And Provides An Impartial Jury For The Individual Litigants.

Petitioner and Amicus Curiae argue that because it is the petit jury and not the venire that is called upon to decide a case, it would be "meaningless" to require a representative cross-section on the venire but then fail to provide for the fair possibility that the representative cross-section will reach the petit jury. This is a *non sequitur*. The jury pool and the petit jury are complementary components of the jury system, and each component serves different purposes and values.

The jury pool or venire must be broadly based. This promotes confidence that no segment of the citizenry is excluded from the criminal justice system, and demonstrates that the government does not have the power to "pack" juries with those who may favor its policies; the government can remove people by challenge, but may not affirmatively recruit. "The right to challenge is the right to reject, not to select, a juror." *Hayes v. Missouri*, 120 U.S. 68, 72 (1887). Juries ultimately selected from broadly-based pools will not be the tool of any limited social class. *See e.g., Glasser v. United States*, 315 U.S. 60 (1942) (it would be improper to select women jurors only from a list submitted by the League of Women Voters).

As this Court has often noted, the right to trial by jury is fundamentally a protection against "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Williams v. Florida*, 399 U.S. 78, 100 (1970). Contrary to petitioner's assertion, the fair cross-section principle need not be implemented on the petit jury (which

must in any event be impartial) in order for the jury system to act as a shield between State and citizen. Because the prosecutor's decision to investigate or indict must be made long before the trial jury is empaneled, those decisions will be constrained by the knowledge that venires are broadly based. The jury pool also provides jurors for a wide range of civil and criminal litigants, and a broadly based pool of individuals who meet some minimal qualifications is likely to provide jurors that will satisfy the demands of a wide range of cases. Procedural regularity in selection is particularly important given that individual defendants have no role in the recruitment of the jury pools.

In contrast, the individual petit jury must satisfy two particular parties, both of whom, not just defendant, seek the good opinion of the jurors, and hope to remove those most likely to be biased in favor of the opposition. The defendant takes an active role in selecting his petit jury, and his acquiescence to being brought to trial depends in large part on this element of control. At this stage, both parties are looking for the best possible jury that can be empaneled—within the constraints imposed by a randomly chosen venire and a limited supply of peremptory challenges.

Petitioner betrays an attitude more appropriate to jury pool selection when he complains that the two black jurors excused in his case "were qualified to serve as jurors."[2]

[2] Petitioner (Brief at 27) goes on to argue that the prosecutors failed to ask questions of the two black jurors "in order to indicate doubt as to eligibility." The point is apparently an allusion to the statement in *Batson* that "the prosecutor's questions and statements during *voir dire*" are among the circumstances relevant to showing discriminatory purpose. *Batson v. Kentucky*, 476

(Footnote continued on following page)

(Brief for Petitioner at 27) That may or may not be true, but both sides want the "best" of the venire; neither side wants to settle for minimally qualified jurors, and fairness and legitimacy would not be advanced by requiring them to do so. If a rule of excusal only for ineligibility (i.e., for statutory "cause") applied to all jurors, it would, in effect, eliminate the peremptory challenge, traditionally "viewed as one means of assuring the selection of a qualified and unbiased jury." *Batson v. Kentucky*, 476 U.S. 79, 91 (1986), citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

If on the other hand, what petitioner means is that black jurors may be excused only for reasons approaching "cause," that is surely an invidious race-based distinction to be making during *voir dire*. Once a black juror qualified for the jury pool, he could be challenged only for reasons articulated on the record (either in open court or in chambers) and acceptable to the judge. No person contemplating jury service is likely to be enthused about the prospect that his personal attributes (inattentiveness, weight, education, grammar, etc.) will be dissected for the record, and any such requirement is certainly discriminatory if applied to blacks only.

[2] *continued*

U.S. 79, 97 (1986). While petitioner notes the absence of questioning of the two black prospective jurors, he does not mention that the prosecutor did not question *any* of the jurors (eight white and two black) who were excused by the State. Since the Illinois Supreme Court's decision in *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977), attorney *voir dire* has been relatively unusual. The reference to *Batson* also suggests that an absence of questioning is "discriminatory", which should be irrelevant to a "systematic exclusion" claim.

The legitimacy and impartiality of the jury system is maintained by selection procedures that duly reflect the different demands of the jury pool and the petit jury. A successful institution is not well-served by a misguided attempt to force the particularized petit jury into the mold designed to produce the general-applicability venire. That attempt—in the name of antidiscrimination—to alter the system protected by the Sixth Amendment should be rejected by this Court.

II.

THE EQUAL PROTECTION CLAUSE AND THE SIXTH AMENDMENT PROTECT DIFFERENT INTERESTS AND HAVE DIFFERENT STANDARDS FOR IMPLEMENTATION, AND A PROBLEM RAISED UNDER ONE PROVISION MUST BE TREATED CONSISTENTLY IN ACCORD WITH THE APPROPRIATE STANDARD.

Both the Sixth Amendment and the equal protection clause have lengthy histories, and within each line of case law, standards have been developed for determining whether the constitutional right at issue has or has not been violated. There is an internal logic to each, and standards developed to assess a violation of one may not be freely appropriated for the purpose of establishing a violation of the other, as petitioner is seeking to do. If petitioner wants to apply Sixth Amendment fair cross-section standards to the petit jury, he must follow Sixth Amendment principles consistently to their logical conclusion. To show why the hybridization or at-will borrowing proposed by petitioner is inappropriate and unworkable, it is useful to compare the standards developed by this Court for evaluating claims of equal protection and Sixth Amendment violations.

A. The Core Value Of The Equal Protection Clause Is The Prohibition Against Discriminatory Intent, And The Standard For Establishing And Rebutting A *Prima Facie* Case Is As Set Forth In *Batson v. Kentucky*.

The core value of the equal protection clause found in the Fourteenth Amendment is protection against discriminatory intent on the part of a state actor. "The invidious quality of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose.' " *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976). "Purposeful discrimination" must be proven." *Whitus v. Georgia*, 385 U.S. 545, 550 (1967).

In the context of the jury selection process, exclusion of potential jurors presents an equal protection question if those jurors are members of a racial minority and if defendant is a member of the same group. This same-race standing requirement for defendant reflects his dual status: he is directly the object of invidious discrimination when he is brought to trial by a criminal justice system from which members of his own race have been excluded, and being of the same race is a plausible party to stand in the shoes and enforce the rights of the excluded jurors, who could themselves sue to enforce their right to participation, *see Carter v. Jury Commissioners*, 396 U.S. 320 (1970). (Because petitioner has chosen not to confront standing directly, he does not address either of these theories of equal protection standing or explain how the analysis is altered when there is no congruence between the race of the defendant and those excluded.) Finally, any exclusion must be attributable to discriminatory intent on the part of the government.

These intuitions about the right at issue, and about what must be proved and who has standing to complain, were

implemented by this Court in *Castaneda v. Partida*, 430 U.S. 482 (1977) (involving the selection of grand jurors). Defendant may establish a *prima facie* case of discrimination by showing that a cognizable group, of which defendant must be a member, has been underrepresented over some significant period of time in the context of a selection process that is susceptible of abuse or not racially neutral. 430 U.S. at 494. Once a *prima facie* case of discrimination is established, the burden shifts to the State to show that the underrepresentation is not due to discrimination.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court followed, but modified, the *Castaneda* standard in order to make discrimination in the *voir dire* of a single trial cognizable. Under the modified standard, a *prima facie* case could be established by showing that:

1. Defendant is a member of a cognizable racial group, members of which have been excluded;
2. The selection process is susceptible of abuse; and
3. All the facts and circumstances raise the necessary inference of purposeful discrimination.

476 U.S. at 96. That is, direct evidence of intent obtainable from the face-to-face confrontation between the prospective jurors and the parties may be substituted for the indirect evidence of intent obtainable from a long-term statistical pattern of exclusion. Once a *prima facie* case of discrimination is established, the burden, as under *Castaneda*, shifts to the State to show that the exclusions were not due to discriminatory animus, but are related to the outcome of the trial. Under the *Castaneda/Batson* standard, underrepresentation, however large, is not actionable unless attributable to purposeful discrimination.

B. The Core Value Of The Sixth Amendment Is The Guarantee Of An Impartial Jury, And The Standard For Establishing And Rebutting A *Prima Facie* Case Is As Set Forth In *Duren v. Missouri*.

The core value of the Sixth Amendment is the guarantee of an impartial jury. The guarantee of impartiality has been held to require that the jury pool be selected from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). That is, no "distinctive" community group may be excluded by the State.

The standard for determining whether exclusion from the jury pool has been established was set forth in *Duren v. Missouri*, 439 U.S. 357 (1979), the Sixth Amendment counterpart to *Castaneda v. Partida*, 430 U.S. 482 (1977). To establish a *prima facie* violation of the "drawn from a fair cross-section" requirement, a defendant must establish that:

> 1) The group alleged to have been excluded is a "distinctive" group in the community;
>
> 2) The representation of this group in the pool from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3) This underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren, 439 U.S. at 364. A *prima facie* case of systematic, or systemic, exclusion (i.e., that due to the operation of the system) may be overcome if the State can establish that "a significant State interest be manifestly and primarily advanced" by those aspects of the system that result in disproportionate exclusion. 439 U.S. at 367-368. Discriminatory animus plays no role in the *Duren* analysis.

As it happens, because the Sixth Amendment jury pool cases have involved underrepresentation that was clearly attributable to the operation of the system, *see Taylor v. Louisiana*, 419 U.S. 522 (1975) (women had to opt in as jurors) and *Duren v. Missouri*, 439 U.S. 357 (1979) (women permitted to opt out), the *prima facie* case has been easily established. It is, however, clear that the critical point is only whether the system does or does not operate to reduce participation by some group; intent (discriminatory animus) has been irrelevant to the *prima facie* case.

Rebuttal of the *prima facie* case appears to be very difficult. Once the State fails in an attempt to show that the apparent underrepresentation of some distinctive group is due to poor census data or merely reflects the operation of some neutral exemption, the State bears a very heavy burden of showing why government interests are served by excluding some distinctive group from the jury pool. The State's interest in permitting women to decline jury service was given very short shrift in *Duren*, 439 U.S. at 357. The greater attention paid in *Taylor* to the same (ultimately unavailing) State interest probably reflects the fact that *Taylor* in effect overruled *Hoyt v. Florida*, 368 U.S. 57 (1961), which had reached the opposite result, only 12 years earlier, when treating a similar situation as an equal protection problem. (The *Taylor—Hoyt* difference also illustrates the pitfalls of constitutional adjudication based on "distinctive groups" rather than the more permanent equal protection categories; any precedent may be vulnerable to rapid social change.)

There is no Sixth Amendment analog to the *Batson* case, applying the concept of systematic or systemic exclusion to the selection of a single petit jury. That, of course, is the question presented by the present case.

C. A Comparison Of The Equal Protection And Sixth Amendment Standards Shows That Petitioner Is Not Making A Sixth Amendment Claim, But Is Simply Asking For The Elimination Of The Same-Race Standing Requirement Of The Equal Protection Clause.

For the first prong of either the *Batson* equal protection test or the *Duren* Sixth Amendment test, it is necessary to show that the excluded jurors are members of a cognizable group. For the equal protection analysis, cognizable groups are those which are historically disadvantaged, such as blacks. Under the Sixth Amendment, it is necessary to show only that those excused are members of a "distinctive group" in the community. While *Taylor* and *Duren* involved the exclusion of women (arguably a cognizable group for equal protection purposes as well, *see Hoyt v. Florida*, 368 U.S. 57 (1961)), this Court has made it clear that a wide range of community groups may be considered "distinctive" for Sixth Amendment purposes. "Communities differ at different times and places. What is a fair cross-section at one time or place is not necessarily a fair cross-section at another time or a different place." *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). It seems clear enough that groups defined by some immutable characteristic such as race or sex would be "distinctive." At the other end of the spectrum, groups defined only by attitude apparently are not. *See e.g., Lockhart v. McCree*, 476 U.S. 162, 177 (1986) (a group excludable under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) for opposition to the death penalty is not distinctive); *United States v. Gometz*, 730 F.2d 475 (7th Cir. 1984) (claim that low rate of response to jury summons resulted in juries on which anti-authoritarian personalities were underrepresented not cognizable). In between are a range of attributes which are not necessarily observable, and

are under the control of the individual to greater or lesser degree. *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946) (a civil jury case) held that the right to "an impartial jury drawn from a cross-section of the community" requires that there be no "systematic and intentional exclusion" of "economic, social, religious, racial, political and geographic groups of the community." 328 U.S. at 220. The systematic exclusion of those "who work for a daily wage" was prohibited. *Id.* at 222. While sexual orientation has not been raised heretofore, petitioner's Sixth Amendment approach would seem to require that (e.g.) jury selection in San Francisco reflect the substantial portion of the population that is homosexual. Other courts too have acknowledged the potentially limitless scope of Sixth Amendment categories. *See, e.g., Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985).

There is thus no basis for petitioner's argument, pressed throughout his Brief, that the Sixth Amendment is violated only when a black juror is excused. That is a totally unprincipled approach to Sixth Amendment jurisprudence, and petitioner's suggestion is explicable only in terms of petitioner's objective: elimination of the standing requirement of an essentially equal protection claim. Such an argument is more appropriately addressed to the Congress, or to a State legislature.

While census data would establish population percentages for some categories, an evidentiary hearing would be required in order to determine whether other suggested groups were really "distinctive" in the community. Jurors would have to be questioned carefully in order to uncover membership in groups defined by characteristics that are not immediately apparent. A juror who was less than candid about, e.g., his religion or sexual orientation

could produce a jury that failed to mirror the community. (Of course there are obvious First Amendment problems with a requirement that a potential juror disclose his religion or memberships, *see NAACP v. Alabama*, 357 U.S. 449 (1958).)

The Sixth Amendment and the equal protection clause have distinct purposes and consequently the second and third prongs of the *Duren* and *Batson* tests as well as the first, involve very different standards. A systematic disproportion itself constitutes an infringement of defendant's Sixth Amendment right to a jury pool chosen from a fair cross-section of the community, and any rebuttal is directed to showing overriding government interest in the systematic procedure that results in the disproportion. *See Duren v. Missouri*, 439 U.S. 355, 368 n.26 (1979). In contrast, the *prima facie* case under the equal protection clause requires a showing of discriminatory animus. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Batson v. Kentucky*, 476 U.S. 79, 93 (1986). A *prima facie* case may then be rebutted by a showing that there was no invidious discriminatory purpose (i.e., that there were race-neutral reasons for the government's actions). *See Castaneda v. Partida*, 430 U.S. 482, 493-95 (1977).

Although some problems can be conceptualized in alternative ways, a problem typically belongs in one category or the other. Thus, for example, the underrepresentation of women on jury pools has been typically viewed as a Sixth Amendment rather than an equal protection issue. Putting aside the matter of standing when a male defendant challenges the exclusion of women, there is clearly no basis for maintaining that any exclusion was designed with invidious intent to bar women from civic participation (the equal protection touchstone). Rather, the policies

examined in *Taylor* (women had to opt in) and *Duren* (women were permitted to opt out)—however patronizing they may seem to a 1980's feminist sensibility—in context were viewed as benefiting the women who cared for children, and advancing a State interest in promoting the family.

In contrast, venire cases involving the exclusion of black jurors have been brought almost exclusively under the equal protection clause. In part this may simply reflect the pre-1968 unavailability of the Sixth Amendment, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), but more important, discriminatory animus is likely to be the only explanation for the wholesale exclusion of blacks from the jury pools, and unlike the governmental interest in permitting homemakers to stay home, there is no rational government interest in eliminating all black jurors from jury service.

It is thus clear that the Sixth Amendment and the equal protection clause address different problems and have different standards of proof. Lines of case law construing the two provisions of the constitution have developed independently. If petitioner is making a claim under the Sixth Amendment, he must follow Sixth Amendment jurisprudence consistently without modification by equal protection principles.

III.

A SIXTH AMENDMENT RULE THAT REQUIRES A PETIT JURY ON WHICH JUROR GROUP AFFILIATION IS RELEVANT IS UNWORKABLE, AND WOULD RESULT IN A GREATLY INCREASED SOCIAL COST IN EXCHANGE FOR NO GAIN IN IMPARTIALITY.

A. An Extension Of The "Fair Cross-Section" Requirement Of The Sixth Amendment From The Jury Pool To The Petit Jury Necessarily Imports A Requirement That The Petit Jury As Empaneled Actually Mirror The Composition Of The Community.

Petitioner bases his "fair cross-section" claim on two lines of case law which have used the phrase. These are the jury pool selection cases (*Taylor v. Louisiana*, 419 U.S. 522, 528 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979)) which held that juries must be selected *from* a pool that represents a fair cross-section of the community, and the jury size/unanimity cases (*Williams v. Florida*, 399 U.S. 78 (1970); *Ballew v. Georgia*, 435 U.S. 223 (1978); *Burch v. Louisiana*, 441 U.S. 130 (1979); *Apodaca v. Oregon*, 406 U.S. 404 (1972)) which, *inter alia*, mentioned the impossibility of achieving a cross-section of the community on a petit jury of fewer than six unanimous individuals.

The jury pool cases unambiguously held that no community group could be excluded from the pool. The jury size cases—the only cases to use the term "fair cross-section" in the context of the petit jury—did not hold the cross-section requirement applicable to the petit jury. Rather, the possibility of a cross-section was listed as one of several rationales (others included the likelihood that several jurors collectively would remember the testimony when note-taking was not permitted) for not reducing the size of the petit jury below six. At bottom, the point was

merely that a "jury" is a collective body, and if reduced below some minimal size it no longer functions as a "group." *Ballew* and *Williams* are more about group dynamics as a function of group size than about broad-based community involvement being a necessary ingredient of impartiality.

Petitioner argues that he seeks nothing more than the "fair possibility" that his petit jury mirrors the community. "Fair possibility" is a meaningful concept at the jury pool or venire level; as long as no community group is systematically excluded from the jury pool, it is a truism that the "possibility" of a fair cross-section of the community on the petit jury remains intact. Enforcement of the "fair possibility" at the level of the jury pool is a simple matter; it is easy to observe whether the jury pool in some jurisdiction over some timespan does or does not approximate the population distribution of (e.g.) men and women. Petitioner, however, is asking to have the "fair possibility" enforced at the level of the petit jury as well, and the cases offer no obvious guide to implementation.

None of the above cases dealt with the petit jury *per se*, or had occasion to consider what would happen if the "fair possibility" either did or did not ripen into an actuality, or even how the judge or the parties might determine whether such had occurred. A "fair possibility" (a concept even more ephemeral than the "flavor" identified in *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975)) must be made operational if it is to be enforceable. To determine whether the accused's Sixth Amendment right to an impartial jury has been violated, or whether a prosecutor has complied with the law, there must be observable real world events that can be identified by the parties, the trial judge, and any court of review.

Although petitioner disavows any interest in a quota system,[3] he is simply incorrect in asserting that a "fair possibility" can be operationalized without resort to numbers when the problem is viewed consistently as a Sixth Amendment issue. The Sixth Amendment cases have been clear and unambiguous in applying the *Duren v. Missouri*, 439 U.S. 357, 364 (1979), standard for establishing and rebutting a *prima facie* case, yet petitioner, despite explicitly arguing a Sixth Amendment claim, simply announces that he "does *not* advocate using *Duren* as the standard by which to determine if the State's exclusion of prospective jurors by use of peremptory challenge violates the constitution." (Brief for Petitioner at 12 n.1 (emphasis in original).) Petitioner fails utterly to explain why he considers the conventional Sixth Amendment standard inapplicable. Petitioner simply asserts that the *Batson* standard (i.e., the equal protection standard)—minus standing—is "adequate." (Brief for Petitioner at 8.)

Petitioner is apparently following the Second and Sixth Circuits in *McCray v. Abrams*, 750 F.2d 1113, 1131 (2d Cir. 1984), and *Booker v. Jabe*, 775 F.2d 762, 773 (6th Cir. 1985), both of which took a slightly more analytical, although no less cavalier, approach to the *Duren* test, finding the second prong inapplicable to the petit jury, and recasting the third *Duren* prong as "a substantial likelihood that challenges were made on the basis of group affiliation." The resulting "adaptation" of *Duren* is indistinguishable from the *Batson* equal protection test. Rather than finding that the test is wrong when the usual Sixth Amendment analysis is "inapplicable" to a supposed Sixth Amendment violation, one may more sensibly turn the question around and ask whether the situation really implicates the Sixth Amendment at all. Petitioner cannot at will opt out of inconvenient aspects of Sixth Amendment jurisprudence. Because curbing "discrimination" is no part of the core guarantee of the Sixth Amendment, the Sixth Amendment has relevance to the selection of the petit jury (or the venire) only to the extent that "systematic exclusion" (the third prong of *Duren*) produces a biased jury.

[3] Petitioner does not explain why he is willing to settle for a "possibility" rather than demanding a quota when he considers the issue so vital as to justify dismantling large segments of equal protection and Sixth Amendment jurisprudence in order to build a new hybrid rule for this purpose alone. Apparently, petitioner concedes that a petit jury which does not mirror the community can still meet Sixth Amendment standards of impartiality.

Systematic exclusion must be determined by reference to the numbers, as in *Duren* by a showing that women were underrepresented in the jury pool "not just occasionally but in every weekly venire for a period of nearly a year." 439 U.S. at 366. However, petitioner seeks to find a Sixth Amendment violation within the confines of a single trial. To do so, he is attempting to substitute "discriminatory exclusion" (the improper motive of the equal protection clause) for "systematic exclusion."

Some such substitution must be made in order to impart some constitutional significance to the composition of the petit jury. Otherwise, petitioner is left with the bare factual observation that 10 individuals, two black and eight white, were excused by the prosecution, an observation devoid of constitutional significance unless it can be placed in a context of either racial animus (in which case it implicates the equal protection clause either via defendant's right or the excluded individuals' civil rights, *see Carter v. Jury Commissioner*, 396 U.S. 320 (1970)), or a pattern of exclusion that is nondiscriminatory, but "systematic", thus implicating the Sixth Amendment. (For

the same reason, the out-come of a single coin toss conveys no information about whether the coin is a fair one.) In this case, the prosecutor specifically stated at trial that the excusal of the two black jurors was not on account of race, and the trial judge made no finding to the contrary, in fact basing his denial of petitioner's motion in part on the State's response.

If promoting impartiality rather than addressing some imagined discriminatory action is petitioner's true purpose, then he cannot make the equal protection substitution for the third prong of *Duren*, and neither may he dismiss the second prong as inapplicable. He must instead apply *Duren* to the jury empaneled in his case. Petitioner cannot avoid the problem of enforcing a "fair possibility" by saying he will enforce "discriminatory" challenges instead. That collapses the Sixth Amendment into the equal protection clause and the "fair possibility" ceases to have any independent significance. There is only one way to be sure that there has been compliance with the cross-sectional requirement: that is to have a cross-section actually present on each petit jury. Then petitioner can have confidence that there has been no Sixth Amendment violation, and the prosecutor can have confidence that the conviction will not be overturned.

This Court, however, has never suggested that a defendant has a right to a petit jury of any particular composition, and indeed has made it quite clear that there is no such entitlement. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *Lockhart v. McCree*, 476 U.S. 162, 173 (1986). And, in a related context, this Court has recently reiterated its concern that a remedy for discrimination not lead to the imposition of numerical quotas. *Wards Cove Packing Co., Inc. v. Atonio*, 57 U.S.L.W. 4583, 4586 (1989) (Title VII disparate impact employment case). Even if

there were a right to some quota, there are obvious practical obstacles to implementing a cross-section on the petit jury. As this Court observed in *Lockhart v. McCree*, 476 U.S. at 178, "if it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of 'balancing' juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on."[4]

With any distribution other than a representative cross-section, and with neither racial animus nor a pattern of

[4] The grand jury cases, although analyzed under the equal protection clause rather than the Sixth Amendment, provide a useful perspective on the idea of empaneling a cross-section. The grand jury involves a small defined group that makes a decision about defendant's own case (like the petit jury) but has to have general applicability for many different cases and is chosen without the participation of the defendant (like the jury pool). On the grand jury there is no tension with peremptory challenges to prevent the selection of each grand jury in a way that will mirror the distribution of cognizable groups in the community. Yet, this Court has never imposed a requirement that the individual grand jury be racially balanced, and the cases have all focused on whether, over some period of time, the selection process produces a pool of grand jurors approximating the community. *See e.g., Alexander v. Louisiana*, 405 U.S. 625 (1972) (*prima facie* case found; population 21% black, grand jury venire 5% black, no blacks on grand jury that indicted); *Arnold v. North Carolina*, 376 U.S. 773 (1964) (in 24 years, only one black served on a grand jury); *Reece v. Georgia*, 350 U.S. 85 (1955) (no black had served in 18 years). The composition of the individual grand juries that indicted these defendants was not decisive; it was merely illustrative of systematic exclusion. Indeed, in *Castaneda v. Partida*, 430 U.S. 482 (1977), the fact that five out of the 12 grand jurors who indicted Rodrigo Partida were Spanish-surnamed was treated as essentially irrelevant given that over an 11-year period, only 39% of the grand jurors were Mexican-American despite a county-wide population of 79.1%.

systematic exclusion across trials to provide context, one would be absolutely at a loss to tell whether any discrepancy is due to chance or to some undetected and undetectable violation of the fair cross-section requirement. Trial judges would have no basis for ruling during *voir dire*, and the composition of the jury would be second-guessed on appeal in order to determine whether a "possibility" had remained intact. (In contrast, the *Batson* equal protection analysis can be usefully applied in the context of a single trial; it is perfectly meaningful to inquire whether an individual juror has likely been excused due to racial animosity, and either possible answer is intelligible.)

Because the venire mediates between the jury pool and the petit jury, a fair cross-section of the community would be hard to empanel without a venire that also represented the community. Of course a different set of problems is generated if the State must affirmatively take steps to ensure that a defendant's venire reflects the community (a claim that petitioner made during his *voir dire* in 1981 (J.A. 7-8)), in order that a jury reflecting the community may be empaneled. A serious potential for divisiveness in the jury assembly room ("You ten Hispanics report to that courtroom"), not to mention manipulation, would arise. Certainly community confidence that jurors are randomly assigned to venires is a major component of the community perception of fairness, impartiality, and legitimacy.

The choices then, if the fair cross-section requirement of the jury pool cases is applied to the petit jury, are a representative petit jury with all the problems that entails, or one that is unrepresentative and in constitutional limbo. The former is unworkable; the latter is meaningless.

When an analysis generates absurd results, it is an indication that the analysis is wrongly applied. Thus, it is respondent's position that the fair cross-section requirement of the jury pool cannot sensibly be applied to the petit jury.

B. Because A Sixth Amendment Analysis Requires That Alleged Underrepresentation Of A Group Be Compared With The Population, The Comparison Cannot Be Made Until 12 Jurors Are Selected, At Which Time The Only Remedy For A Sixth Amendment Violation, Absent A Harmless Error Analysis, Is A Mistrial.

The *Batson* rule addresses discriminatory choices exercised against individual minority jurors. The trial judge and the parties can observe a pattern of strikes developing, and can evaluate the likelihood that the choices are inexplicable except on the hypothesis of discriminatory intent. A "mid-course correction" can be made by the trial judge ("experienced in supervising *voir dire*," *see Batson* 476 U.S. at 97), admonishing the offending attorney or making inquiries. *Voir dire* under *Batson* can be a fluid process, and only in extreme circumstances would a mistrial be necessary.

In contrast, because a Sixth Amendment approach to jury selection has nothing to do with discriminatory intent, individual peremptory challenges are without significance. Only when the entire jury is empaneled is it possible to count the numbers of each "distinctive group," to determine, in accord with *Duren v. Missouri*, whether any group is underrepresented. Thus as jury selection proceeds, the prosecutor will have no way of knowing whether his choice will turn out to violate the constitution. ("Have I chosen too few women, or blacks? Too many?") There is obviously a theoretical problem if the constitutionality of a peremptory challenge depends on the fortuity of who

appears for jury duty that day, and on the order in which the jurors are examined. If the prosecutor has guessed wrong, and the numbers do not match, he is faced with a mistrial at the end of *voir dire*. If a category is oversubscribed after the first panel of four is selected (if, for example, the voting pool in some jurisdiction were 25% black, four blacks would be too many, presaging an underrepresention of some other group), then the remainder of the *voir dire* would be a charade. If (e.g.) the prosecution removed the fifth or sixth black juror on account of his race in order to produce a representative cross-section, he would simultaneously be violating the equal protection mandate of *Batson*. None of this is likely to prove edifying for the citizens who reported for jury duty that day.

The obvious alternative to a mistrial is a harmless error analysis, an alternative thus far rejected in Sixth Amendment jury pool cases, although in general permitted in Sixth Amendment cases, *see Satterwhite v. Texas*, 108 S.Ct. 1792 (1988). If a given procedure is found to "systematically exclude" any distinctive group from the jury pool, that has been the end of the inquiry and the conviction is reversed. As Rehnquist, J., dissenting in *Taylor v. Louisiana*, 419 U.S. 522, 538-39 (1975), pointed out, a finding of a Sixth Amendment venire violation leads to a reversal "without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected." *See also Ballard v. United States*, 329 U.S. 187, 194 (1946) (the exclusion of women on a federal jury "may not in a given case make an iota of difference"). In part this draconian result is tolerable because "systematic exclusion" for Sixth Amendment purposes, as heretofore dealt with in the case law, operates at the level of the "system" or mechanism of juror recruitment for the jury pools. Therefore, a single court decision is enough to alter the

juror recruitment system for all time; a jurisdiction only needs to be informed that it must recruit jurors by some mechanism whose operation does not have the effect of systematically excluding any identifiable segment of the community. It is now typical, as in Illinois, to select jurors from voting lists, thus obviating any possibility of systematic exclusion of those who are otherwise qualified. With such juror recruitment schemes in effect throughout the country, it is not surprising that jury pool selection has essentially vanished as a subject of litigation. A problem has been solved by enforcing a rule of procedural regularity in jury pool recruitment.

In contrast, if the Sixth Amendment is applied to regulate group representation at the level of the petit jury (whether allegedly enforcing a "fair possibility" or a quota system), a single court decision can have no such clarifying effect. Any given appellate decision holding (e.g.) that a given jury was insufficiently representative of the community is simply a one-shot decision. It does not "solve" any problem with the operation of the criminal justice system because it does not deal with any systematic or systemic procedures; it deals with and can address only individual human choices. That is, the Sixth Amendment in the context of the jury pool addresses procedural regularity, while in the context of the petit jury it addresses the ends achieved. There can be no "progress" over time as there has been in the jury pool context. The representativeness of the petit jury can and will be litigated afresh in every single trial.

For this reason, it is vital that if the representativeness of the petit jury (rather than the jury pool) is to be challenged, there be an inquiry into whether the exclusion of a juror identifiable with some group really results in greater partiality on the empaneled jury. Otherwise, a

mistrial is granted or a conviction reversed when there is nothing to be "improved" at a new trial, there being no discriminatory animus or actual partiality involved. A reversal is thus a pure windfall for the defendant, at great cost and no counterbalancing gain for society. While this approach might be termed a "harmless error" analysis, that is actually somewhat of a misnomer. The Sixth Amendment requires only "impartiality," and if the empaneled jury is impartial, there is no error, harmless or otherwise. The point, however denominated, is that if the petit jury cannot be shown to be other than impartial, the Sixth Amendment does not permit the jury to be invalidated on account of its group composition. It cannot be argued that it is constitutionally imperative to have an equally impartial jury of a different racial composition. Whatever social policy that might be thought to advance, it certainly has nothing to do with the Sixth Amendment.

C. If The Impartiality Clause Of The Sixth Amendment Is Interpreted To Require A Petit Jury On Which Juror Group Affiliation Is Relevant, Then Every Defendant Would Have Standing To Litigate The Composition Of His Petit Jury.

In his Argument II, petitioner argues that a white defendant should have standing to object to the exclusion of black potential jurors. Respondent maintains that petitioner's remedy—the *Batson* remedy minus a standing requirement—is rooted in neither the equal protection clause nor the Sixth Amendment and is neither permitted nor required by either. The only possible rationale for extending equal protection standing (under the guise of the Sixth Amendment) to a white defendant is, as petitioner argues, Brief for Petitioner at 17, that while black defendants can act as private attorneys general "to correct . . .

racial misuse" of peremptory challenges, "white defendants have no comparable weapon to fight racial bigotry and the war against racial discrimination is thereby crippled." That is, petitioner is making an equal protection policy argument—not traceable to, let alone rooted in, the Sixth Amendment—that every defendant should be able to act as an enforcer of the Reconstruction Amendments. Petitioner does not cite any support for this novel theory of standing, *see* Brilmayer, L., *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297 (1979), and whatever its merits, it is certainly far afield from any concern for impartiality, the ostensible rationale for his Sixth Amendment claim.

If respondent's position is adopted, the standing issue does not arise. If, however, this Court adopts petitioner's argument that the "impartiality" of the petit jury is determined and measured by the group affiliation of the empaneled jurors, then the full logic of the Sixth Amendment requires that every single defendant have standing to complain. While the equal protection clause was directed toward disadvantaged groups, the Sixth Amendment, adopted in 1789, clearly applied to each and every defendant brought to trial in the federal courts. While it is debatable whether *all* the attributes of the Sixth Amendment right to a jury trial have been made applicable to the states via the Fourteenth (*see Duncan v. Louisiana*, 391 U.S. 145 (1968)), it has never previously been suggested that the incorporated provisions apply only to one class of citizens—i.e., those singled out for unique protection by the equal protection clause.

Therefore, if the full force and internal logic of the Sixth Amendment—unaltered by equal protection concepts—is to be applied, there would be no standing requirement, and every defendant, in every trial, would be entitled to

litigate the factual question of whether his petit jury reflects all distinctive community groups—whether those groups be identifiable by race, religion, sex, occupation, ethnic origin, sexual orientation or other distinctive attribute.

D. If The Sixth Amendment Guarantee Of An Impartial Jury Is Interpreted To Bar The Peremptory Challenge Of Prospective Jurors Who Are Identifiable By Group Affiliation, That Bar Must Be Equally Applicable To Prosecution And Defense Because A One-Sided Bar Would Necessarily Produce A Less Impartial Jury.

Throughout his brief, petitioner argues that the Sixth Amendment constrains "the prosecutor" or "the State" in the exercise of peremptory challenges, but petitioner says nothing about whether defendant is constrained as well. That is the question expressly left open by this Court in *Batson v. Kentucky*, 476 U.S. 79, 89 n.12 (1986): "We express no view on whether the Constitution [clause unspecified] imposes any limit on the exercise of peremptory challenges by defense counsel." While the language of the equal protection clause is directed against the government (although there is arguably state action when the court excuses those peremptorily challenged by the defense), the structure of the Sixth Amendment appears to impart symmetry. The Sixth Amendment provides that "the accused shall enjoy" the right to a trial by an impartial jury, but it does not say how impartiality is to be achieved. The provisions of the Bill of Rights were adopted as restraints on the federal government, and through incorporation via the Fourteenth Amendment, now serve to bind the States as well. Thus, it is clear that whatever it is that the Sixth Amendment means by "impartiality," it bars the State from creating a biased jury. The question, then, is whether the Sixth Amendment also bars a defendant from exercising peremptory challenges that create a biased jury.

In general, a defendant can waive a constitutional right, but waiving the right to an impartial jury must mean acceptance of a jury more favorable to the State—although it is a little difficult to imagine what such a waiver would mean in practice.[5] But, it is not meaningful to say that a defendant could waive impartiality and instead "accept" a jury partial to him.

The accused is entitled to an impartial jury, nothing less, but surely nothing more. If the accused is allowed to exercise group-based peremptory challenges and the State is not, then the resulting jury would not be impartial; it would be biased in favor of the defense. This assumes that group-based challenges have an impact on impartiality, an assumption that petitioner urges here, and an assumption that must be accepted in order for this Court to hold that the Sixth Amendment restricts the State's peremptory challenges. If the State is restricted, then the defense must be restricted in the same manner or the resulting jury will by definition be less impartial than under present law. The suggestion that the defense would exercise peremptory challenges in a group-based fashion is not fanciful. The *voir dire* reported in *Booker v. Jabe*, 775 F.2d 762, 764 (6th Cir. 1985), is only an unusually blatant example of a common occurrence—a black defendant systematically removing white jurors. Such conduct by the accused cannot be protected by a constitutional provision guaranteeing his right to an "impartial" jury.

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[5] Waiver of trial by jury in favor of a bench trial—a right which in Illinois is exclusively the defendant's, *see People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 533 N.E.2d 873 (1989)—is a different matter, having nothing to do with waiving impartiality.

As this Court has noted before, systematic exclusion does not injure the defendant alone. "There is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S. 187, 195 (1946). In *Wheat v. United States*, 108 S.Ct. 1692 (1988), this Court held that the principle of a fair trial for the State could even overcome a matter as fundamental as defendant's choice of counsel. If a symmetrical interpretation of the Sixth Amendment is not adopted, then the increased partiality that would result from the asymmetrical rule urged by petitioner provides an additional reason why this Court should reject petitioner's interpretation of the Sixth Amendment; the Sixth Amendment, which by its terms guarantees only "impartiality" cannot sensibly be held to mandate a procedure that necessarily increases the risk that biased jurors will be empaneled.

There are also insurmountable practical problems if the State is directed to produce a cross-sectionally balanced petit jury while the accused is simultaneously engaged in removing jurors of (e.g.) the victim's race. How is the ideal of community proportional representation to be tested? By the distribution in the county? On the jury pool that month? On the venire sent to the courtroom that day? On the venire remaining after the defense has removed members of the victim's ethnic group? This uncertainty, coupled with the problem that compliance with a fair cross-section requirement must be tested by the numbers at the end of *voir dire*, would seem to make jury selection (a lengthy process under current law) a near impossibility.

IV.

THE "IMPARTIALITY" GUARANTEE OF THE SIXTH AMENDMENT REQUIRES A JURY OF INDIVIDUALS WHO ARE "INDIFFERENT" BETWEEN PROSECUTION AND DEFENSE, AND IS INCOMPATIBLE WITH A REQUIREMENT THAT THESE JURORS BE OF ANY PARTICULAR GROUP AFFILIATION.

Even if petitioner is prepared to follow a consistent Sixth Amendment analysis, with all the practical problems that entails, a Sixth Amendment rule regulating selection of the petit jury on the basis of the group affiliation of the prospective jurors still may not be imposed on the States unless it can be shown that absent such a rule, the States are in violation of the Sixth Amendment. This, petitioner cannot show. The Sixth Amendment speaks only of the right to an "impartial" jury, and petitioner has failed to show any connection between "impartiality" and juror group affiliation. In fact petitioner is unusual in equating representativeness and impartiality.[6] Even petitioner Batson, whose claim was based only upon the Sixth Amendment, argued that the excusal of black prospective jurors from his venire violated his rights "to an impartial jury *and* to a jury drawn from a cross-section of the community." *Batson v. Kentucky*, 476 U.S. 79, 84 n.4 (1986) (emphasis added).

Although not otherwise defined in the Constitution, the term "impartial" has a clear dictionary and decision theory

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[6] It is the equating of the two that creates the tension perceived by petitioner between the peremptory challenge and the cross-sectional requirement. A conflict arises only if representiveness is required on the petit jury and is viewed as an end in itself rather than as a component of a jury selection system whose only touchstone is impartiality. Neither should the peremptory challenge be viewed as an end in itself; it is only a tool for obtaining impartiality.

meaning, which has been explicated in numerous decisions by this Court. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961) (jury demonstrably partial when 8 out of 12 jurors, influenced by pre-trial publicity, had expressed a belief in the defendant's guilt). Despite the absence of any uncertainty over the meaning of "impartial", petitioner argues that impartiality must now be redefined to be linked with group membership, i.e., that the Sixth Amendment prohibits the excusal of jurors identifiable by group membership. Consider the argument in the context of petitioner's own trial. Petitioner must be saying: "I want two impartial jurors who are also black." But, the Sixth Amendment entitles petitioner only to impartial jurors, not to jurors who are "impartial plus," so the Sixth Amendment is not implicated. If what petitioner means is that the prosecution may not excuse two impartial jurors (in favor of two other impartial jurors) because of the fact that they are black (and such did not occur in this case), then petitioner is making an equal protection, not a Sixth Amendment claim, and being white he has no standing to raise the issue. Of course if the two jurors are not impartial, then neither the Sixth Amendment nor the equal protection clause is implicated. And, if 12 impartial jurors are selected, then the accused has the jury promised by the Sixth Amendment regardless of the group affiliation of those included and excluded. In the race discrimination context, of course, it has been held to be an insufficient answer that all the white jurors were impartial,[7] but that

[7] This Court in *Allen v. Hardy*, 478 U.S. 255, 259 (1986), stated that the *Batson* rule, which "ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice," had only "some bearing" on the truthfinding function of the jury trial.

reflects the weight of the deeply held social values of the equal protection clause. The "flavors" and "possibilities" that are a derivative value of the Sixth Amendment cannot very well outweigh the "impartiality" that is the only expressed mandate of the Sixth Amendment.

A variant on petitioner's impartiality argument was suggested by Justice Stevens, dissenting in *Teague v. Lane*, 109 S.Ct. 1060, 1079 n.1 (1989), who asserted that the Sixth Amendment conferred upon the accused a "right to have his petit jury selected by procedures that are 'impartial'." It should first be noted that fairness in selection is an equal protection concept; it refers to the subjective purpose of the decision maker, rather than to the outcome promised by the Sixth Amendment. More important, there is no necessary correspondence between an impartial procedure and an impartial end result; an impartial procedure may or may not result in an impartial jury. For example, the selection of the members of the jury pool who are to report to the courthouse on any given day is pre-determined according to some impartial system, and the members of the day's pool sent as a venire to a courtroom are typically drawn either at random or in accord with some non-random but unbiased means. Such procedures are widely viewed as fair and impartial and not susceptible of manipulation, but are quite likely to result in a venire populated with a wide range of viewpoints and biases. In fact, the more broad-based the jury pool, the greater is the likelihood that extremes of opinion will appear on the venires. The broader the jury pool in terms of attitudes sampled, the more necessary is the peremptory challenge; impartiality on the petit jury cannot be achieved unless biases are eliminated, and the peremptory challenge of those perceived to be biased has long been recognized as necessary to obtaining an impartial

jury. *Hayes v. Missouri*, 120 U.S. 68 (1887). If peremptory challenges were eliminated, and the jury filled with the first 12 individuals to survive challenges for cause, an undeniably impartial selection procedure could well result in a jury totally unacceptable to one or both parties, and rightly viewed with suspicion by the community at large. Or, as the Fifth Circuit put it, "A cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased." *Smith v. Balkcom*, 660 F.2d 573, 583 (5th Cir. 1981).

The composition of petitioner's own venire illustrates the instability of a single sample as an exemplar of a population. Only two out of 40 venire members were black. The 1980 census showed Cook County to be approximately 25% black. The northern part of the county, from which petitioner's venire was drawn, has a relatively higher white population than the county as a whole (petitioner offered no data about the racial composition of the registered voter pool for any part of the county), but blacks may still have been underrepresented on petitioner's venire—due to chance, not to systematic exclusion. And, a jury of 12 picked at random from petitioner's venire could easily have been all white. The result would be random, and might be impartial, but would not be cross-sectionally representative of either the venire or the jury pool. The "possibility" of a cross-section under any such random draw is of no practical significance. Only over time would one expect juries, venires, or jury pools to approximate the racial composition of the voting population in the geographic area from which the jury pool is drawn.

As an alternative basis for his request that the fair cross-section requirement be extended to the petit jury, petitioner argues for the necessity of a "counterbalancing of views" on the petit jury. (Brief For Petitioner at

15) Counterbalancing of views is a good description of the political process in a democracy, but it has nothing to do with "impartiality"—the requirement of the Sixth Amendment. An "impartial" juror is one who is, *a priori*, "indifferent" as between defense and prosecution. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.") The term "indifferent" refers to one who is at equipoise between two alternatives; impartiality has never been understood to refer to the netting out of divergent viewpoints. Such a jury would be impartial only in a statistical sense—and not a prospect likely to satisfy the litigants, especially given the unanimity requirement which allows one extreme viewpoint to produce a hung jury. In *Lockhart v. McCree*, 476 U.S. 163, 177-178 (1986), this Court specifically rejected the theory that an "impartial *jury*" was to be obtained by "balancing the various predispositions of the individual *jurors*;" "an impartial *jury* consists of nothing more than *jurors* who will conscientiously apply the law and find the facts." (citation omitted; emphasis in original)

More fundamentally, the theory behind petitioner's impartiality argument is diametrically opposed to the equal protection theory of *Batson*. *Batson* specifically held that "a person's race simply 'is unrelated to his fitness as a juror.' " 476 U.S. at 87, quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J. dissenting). Thus, by hypothesis, a prosecutor could be removing black jurors (trial-related reasons aside) only because of racial prejudice, "a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85. Petitioner here argues that race *does* matter; hence the argument that the Sixth Amendment is violated when

black jurors are removed, leaving fewer of their number on the jury to contribute their unique point of view. What other possible reason can petitioner offer for the proposition that he has "the constitutional right under the Sixth Amendment to the fair possibility his petit jury will contain blacks"? (Petitioner's Brief at 15.)

Presumably petitioner relies on the *Batson* decision to ensure that blacks will not be removed by a prejudiced prosecutor who for some reason is more interested in excluding blacks from civic participation than in empaneling jurors who will give the prosecution's case a fair hearing (the equal protection problem). Assuming (as we must) that the *Batson* decision has been applied to prevent such discrimination and the jury is properly constituted for purposes of the equal protection clause, petitioner also wants a "*Batson* remedy predicated on the Sixth Amendment", Petitioner's Brief at 6, to ensure that the prosecutor will in addition keep a balance of community representatives on the jury. That is, while equal protection *forbids exclusion* on the basis of race, petitioner's Sixth Amendment approach *mandates inclusion* on the basis of race.

Under the present system of jury selection, the jury pool is selected in a way that does not systematically exclude any segment of the community, and venires are drawn from the pool by some system that precludes governmental manipulation of venire composition. From the venire, the parties select their petit jury, with the State constrained from discriminatory selection by the *Batson* decision. The resulting petit jury is both "indifferent" as between the parties and "drawn from a representative cross-section of the community." Petitioner has failed to demonstrate that this system—exactly that *guaranteed* by the Sixth Amendment—in fact *violates* the Sixth Amendment. His argument that the system should be radically

altered by extending the cross-sectional requirement from the jury pool to the petit jury should therefore be rejected.

CONCLUSION

The State of Illinois respectfully requests that this Honorable Court affirm the decision of the Illinois Supreme Court.

Respectfully submitted,

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